IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ELIZABETH G. DUNCAN,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 08-2144-JWL-DWB**
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

REPORT AND RECOMMENDATION

Plaintiff seeks review of a decision of the Commissioner of Social Security (hereinafter Commissioner) denying disability insurance benefits (DIB) and supplemental security income (SSI) under sections 216(i), 223, 1602 and 1614(a)(3)(A) of the Social Security Act. 42 U.S.C. §§ 416(i), 423, 1381a, and 1382c(a)(3)(A)(hereinafter the Act). Finding error in the ALJ's evaluation of the medical opinions, the court recommends the decision be REVERSED and the case be REMANDED in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

I. Background

On Aug. 25, 2006, Administrative Law Judge (ALJ) George M. Bock issued his decision and summarized the history of this case:

> The claimant filed applications for a Period of Disability, Disability Insurance Benefits and Supplemental Security Income Benefits under Titles II and XVI of the Social Security Act ("Act") on May 20, 2003. She alleged an onset date of disability of April 1, 2001. The claims were denied initially and on reconsideration by the State agency. After the claimant filed a timely request for hearing on February 19, 2004, a hearing was held and a partially favorable decision was issued on July 29, 2005 by Administrative Law Judge Edward G. Hoban of Manchester, New Hampshire. (Exhibit 3A) The claimant requested a review of the decision by the Appeals Council disagreeing with her onset date of disability. (Exhibit 11B) The Appeals Council remanded the case to the hearing level for a new hearing to obtain more evidence. (Exhibit 12B)
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> A subsequent hearing was held on July 27, 2006, in Kansas City, Kansas before the undersigned Administrative Law Judge. The claimant appeared in person and testified at the hearing. She is represented by Cara Rerrell, Attorney at Law. Richard Watts, M.D., testified at the hearing as a qualified medical expert and Barbara Meyers testified as a qualified vocational expert. (Exhibit 16B) In addition, the claimant's husband, Robert Connley, testified on behalf of the claimant.

(R. 23).

ALJ Bock found that plaintiff was disabled within the meaning of the Act and the regulations beginning Aug. 1, 2003, but not before. (R. 23-30). Because he found plaintiff insured for DIB only through Dec. 31, 2002, the ALJ determined that plaintiff is eligible for SSI pursuant to Title XVI but not DIB under Title II of the Act. (R. 24).

The ALJ found that plaintiff has not engaged in substantial gainful activity since her alleged onset date of Apr. 1, 2001. (R. 24). He discussed the medical evidence and medical opinions

and gave "great weight to the opinions of claimant's treating psychiatrist, Dr. Pulcher,"[1] but "little weight" to the opinion of Dr. Block, a physician who began treating plaintiff on Jan. 28, 2004. (R. 25). He gave no weight to the opinion of Dr. Benton because the record contains no progress notes to support the bare opinion expressed by Dr. Benton. Id. He gave "little weight" to the opinions of the state agency physicians and psychologists. (R. 26).

The ALJ found that plaintiff has "severe" impairments consisting of fibromyalgia syndrome, degenerative disc disease and degenerative joint disease of the spine, edema, asthma, and depression. Id. He found that plaintiff's migraines and wrist injury are not "severe," and her vision problems and thrush are not medically determinable impairments in the circumstances. Id. He found that plaintiff's combination of impairments does not meet or medically equal the severity of a Listed impairment. Id.

The ALJ found plaintiff's allegations of disabling symptoms "only partially credible," but he found her husband's testimony credible. (R. 27). He found that before Aug. 1, 2003, plaintiff had the residual functional capacity (RFC) for a range of sedentary work augmented by the ability to lift and carry twenty

[1]In summarizing Dr. Pulcher's report, the ALJ identified Dr. Pulcher as Dr. Pulch**a**r. (R. 25). Plaintiff did the same throughout her brief. (Pl. Br. 10). However, the record reveals the correct spelling of the psychologist's name is Dr. "Pulcher" (R. 227, 229), and the court will use that spelling.

pounds occasionally and ten pounds frequently, but limited by the need for a sit/stand option, the ability to stand and/or walk only fifteen to twenty minutes at a time, the ability to climb stairs, bend, stoop, kneel, crouch, and crawl only occasionally, and an inability to climb ladders, ropes, or scaffolds, be around extreme heat or cold, or be exposed to airborne irritants. (R. 27). He found that on and after Aug. 1, 2003, plaintiff has additional restrictions producing moderate limitations in her mental abilities: to understand, remember, and carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; and to respond appropriately to changes in the work setting. Id.

The ALJ determined that before Aug. 1, 2003, plaintiff was not disabled within the meaning of the Act because she was able to perform her past relevant work as a medical transcriber. (R. 27-28). But, he determined that beginning Aug. 1, 2003 plaintiff was unable to perform her past relevant work or any other work which exists in significant numbers in the economy and was therefore disabled within the meaning of the Act. (R. 28).

Consequently, he denied plaintiff's applications for DIB and SSI before Aug. 1, 2003. (R. 30). He found plaintiff not entitled to DIB at any time because her insured status expired before Aug. 1, 2003. (R. 30). He found plaintiff disabled for purposes of SSI beginning Aug. 1, 2003, and informed her that the Social Security Administration would determine her eligibility for SSI payments pursuant to action by another office of the Social Security Administration. Id.

Plaintiff once again disagreed with the onset date determination and sought, but was denied, Appeals Council review of the ALJ's decision. (R. 12-14, 18). Therefore, the ALJ's decision is the final decision of the Commissioner. Id.; Blea v. Barnhart, 466 F.3d 903, 908 (10th Cir. 2006). Plaintiff now seeks judicial review of the decision.

II. Legal Standard

The court's review is guided by the Act. 42 U.S.C. §§ 405(g), 1383(c)(3). Section 405(g) provides, "The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court must determine whether the factual findings are supported by substantial evidence in the record and whether the ALJ applied the correct legal standard. Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007); White v. Barnhart, 287 F.3d 903, 905 (10th Cir. 2001). Substantial evidence is more than a scintilla, but less than a preponderance,

and it is such evidence as a reasonable mind might accept to support a conclusion. Zoltanski v. F.A.A., 372 F.3d 1195, 1200 (10th Cir. 2004); Gossett v. Bowen, 862 F.2d 802, 804 (10th Cir. 1988). The court may "neither reweigh the evidence nor substitute [it's] judgment for that of the agency." White, 287 F.3d at 905 (quoting Casias v. Sec'y of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991)); Frantz v. Astrue, 509 F.3d 1299, 1300 (10th Cir. 2007); Hackett v. Barnhart, 395 F.3d 1168, 1172 (10th Cir. 2005). The determination of whether substantial evidence supports the Commissioner's decision, however, is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it constitutes mere conclusion. Gossett, 862 F.2d at 804-05; Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989).

An individual is under a disability only if that individual can establish that she has a physical or mental impairment which prevents her from engaging in substantial gainful activity and is expected to result in death or to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d). The claimant's impairments must be of such severity that she is not only unable to perform her past relevant work, but cannot, considering her age, education, and work experience, engage in any other substantial gainful work existing in the national economy. Id.

The Commissioner uses a five-step sequential process to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920 (2006); Allen v. Barnhart, 357 F.3d 1140, 1142 (10th Cir. 2004); Ray, 865 F.2d at 224. "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988).

In the first three steps, the Commissioner determines whether claimant has engaged in substantial gainful activity since the alleged onset, whether she has severe impairments, and whether the severity of her impairments meets or equals the severity of any impairment in the Listing of Impairments (20 C.F.R., Pt. 404, Subpt. P, App. 1). Id. at 750-51. If plaintiff's impairments do not meet or equal the severity of a listing, the Commissioner assesses claimant's RFC. 20 C.F.R. §§ 404.1520, 416.920. This assessment is used at both step four and step five of the sequential evaluation process. Id.

After assessing claimant's RFC, the Commissioner evaluates steps four and five--whether the claimant can perform her past relevant work, and whether she is able to perform other work in the economy. Williams, 844 F.2d at 751. In steps one through four the burden is on claimant to prove a disability that prevents performance of past relevant work. Dikeman v. Halter, 245 F.3d 1182, 1184 (10th Cir. 2001); Williams, 844 F.2d at 751

n.2. At step five, the burden shifts to the Commissioner to show other jobs in the national economy within plaintiff's capacity. Id.; Haddock v. Apfel, 196 F.3d 1084, 1088 (10th Cir. 1999).

Plaintiff claims the ALJ failed to properly develop the record (Pl. Br. 7-8), failed to determine the onset date of disability in accordance with Social Security Ruling (SSR) 83-20, (Pl. Br. 8-9), and erred in weighing the medical opinions of Dr. Pulcher and Dr. Stevens. (Pl. Br. 10). The Commissioner argues that the ALJ properly developed the record, properly applied SSR 83-20, and properly evaluated the medical evidence, and that substantial evidence supports the decision. (Comm'r Br. 5-14). The court begins with consideration whether the ALJ adequately developed the record in this case.

III. Duty to Develop the Record

Citing Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992), plaintiff argues that the key issue in determining whether the ALJ adequately developed the record "is whether enough questions were asked for the ALJ to ascertain the nature of Plaintiff's alleged impairments, the treatment and medication she received, and the impact of the alleged impairment on her daily routine and activities." (Pl. Br. 7). Plaintiff then argues that the ALJ failed to ask enough questions of plaintiff regarding her condition in 2001 and 2002, failed to seek additional evidence from treating or examining physicians

regarding plaintiff's condition in 2001 and 2002, and failed to ask the medical expert (ME) any questions regarding plaintiff's condition in 2001 and 2002. Finally, she argues that the ALJ erred in questioning the ME although the ME had heard none of plaintiff's testimony regarding her condition. (Pl. Br. 7-8). The Commissioner argues that the ALJ need not pursue every potential line of questioning, but must use reasonable good judgment to "fully and fairly develop the record as to material issues." (Comm'r Br. 8)(quoting Hawkins v. Chater, 113 F.3d 1162, 1168 (10th Cir. 1997)(citing Glass v. Shalala, 43 F.3d 1392, 1396 (10th Cir. 1994) and Baca v. Dep't of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993)).

"[A] Social Security disability hearing is a nonadversarial proceeding, in which the ALJ has a basic duty of inquiry, 'to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts.'" Musgrave, 966 F.2d at 1374. "This duty is not a panacea for claimants, however, which requires reversal in any matter where the ALJ fails to exhaust every potential line of questioning." Glass, 43 F.3d at 1396.

In the circumstances presented here, the court finds that "enough questions were asked for the ALJ to ascertain the nature of Plaintiff's alleged impairments, the treatment and medication she received, and the impact of the alleged impairment on her

daily routine and activities." (Pl. Br. 7). With regard to plaintiff's condition before 2003, the ALJ presiding at each hearing sought and received plaintiff's testimony regarding when she first quit working, why she quit working, what her condition was at that time, and how it had progressed since then. (R. 332-39, 341-42, 369-72). In each case, plaintiff's attorney followed up with questions regarding plaintiff's condition when she worked as a nanny, which was also before 2003. (R. 344-45, 375-77). Each ALJ received testimony from plaintiff's husband regarding the progression of plaintiff's condition since 2001. (R. 346-47, 382-88).

Further, where plaintiff is represented by counsel at the ALJ hearing, the ALJ "should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." Hawkins, 1123 F.3d at 1167. Plaintiff's counsel pursued further examination of the witnesses at each ALJ hearing, and if he felt the ALJ was not adequately seeking necessary facts, could have asked the necessary questions to ensure the issues were properly addressed. The court finds no failure to properly develop the record.

Despite plaintiff's protestations to the contrary, further inquiry was not required of the ALJ. Moreover, although plaintiff claims the ALJ failed to ask enough questions and

failed to secure additional medical evidence, she points to no additional information which might have been revealed by more questioning and to no additional evidence regarding her condition in 2001 and 2002 which would have been available had the ALJ sought additional evidence from treating or examining physicians. In fact, plaintiff admits that "the medical records from that period of time are not as extensive or detailed as Plaintiff would like." (Pl. Br. 9). The ALJ did not err in his development of the record.

With regard to plaintiff's complaint that the ME did not hear plaintiff's testimony, plaintiff's argument misunderstands the regulations and the purpose of a ME. The regulations provide that an ALJ "may also ask for and consider opinions from medical experts on the nature and severity of [a claimant's] impairment(s) and on whether [claimant's] impairment(s) equals the requirements of any impairment listed." 20 C.F.R. §§ 404.1527(f)(2)(iii), 416.927(f)(2)(iii). And, an ME is a "nonexamining source" defined as, an "acceptable medical source who has not examined [the claimant] but provides a medical or other opinion." Id. at §§ 404.1502, 416.902. Thus, the purpose of having a ME is to seek the expert medical opinion of a source who has reviewed the medical record, and may provide medical advice to the ALJ. The regulations do not require the ME to hear the testimony of the claimant.

Plaintiff does not cite, and the court's research does not reveal, any authority for the proposition that a ME must hear the claimant's testimony. The court's research revealed only six cases which even mention that an ME heard the claimant's testimony. Cotton v. Sullivan, 2 F.3d 692, 694 (6th Cir. 1993)(observed and heard); Mollo v. Barnhart, 305 F. Supp. 2d 252, 259 (E.D.N.Y. 2004)(heard); Preston, ex rel. K.B. v. Astrue, No. 3:06-cv-1080-J-TEM, 2008 WL 876349 at *7 (M.D. Fla. Mar. 27, 2008)(observed and heard); Braithwaite v. Barnhart, No. 04 Civ. 2850(GBD)(DF), 2007 WL 5322447 at *5 (S.D.N.Y. Dec. 20, 2007)(heard); Tolini v. Barnhart, No. 05-230-P-S, 2006 WL 2827660 at *3 (D. Me. Sept. 29, 2006)(heard); Burley v. Barnhart, No. C.A. 04-4568, 2005 WL 2212363 at *3 (E.D. Pa. Sept. 9, 2005)(heard and evaluated). In the cases cited, the fact that the ME heard the claimant's testimony was not necessary to the decision reached by the court. Moreover, plaintiff does not show why hearing plaintiff's testimony was necessary to the ME's opinion in this case. The court finds no error in the decision to take the testimony of the ME before plaintiff testified.

IV. Evaluation of Medical Opinions

Plaintiff claims the ALJ erred in failing to give substantial weight to the opinions of her treating physicians. (Pl. Br. 9). Specifically, she argues, "The rule in the 10th Circuit has long been that the Commissioner must give substantial

weight to the evidence of a claimant's treating physician," that Dr. Pulcher is a nontreating source and a psychologist not a psychiatrist, and that the ALJ erroneously gave Dr. Pulcher's opinion greater weight than the weight given the opinion of plaintiff's treating physician, Dr. Stevens. (Pl. Br. 10)(citing Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987)(quoting Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985))). The Commissioner argues that the record contains no medical opinion from Dr. Stevens, that "Dr. Stevens treatment notes document little more than Plaintiff's subjective complaints and her medication regimen" (Comm'r Br. 12), and that the decision is consistent with Dr. Steven's treatment records. (Comm'r Br. 13).

The law of the Tenth Circuit is not so favorable to plaintiff as her brief suggests. In the portion of the Frey opinion cited by plaintiff, the court noted, "The well-established rule in this circuit is that the Secretary must give substantial weight to the testimony of a claimant's treating physician, unless good cause is shown to the contrary." Frey, 816 F.2d at 513(citing Turner, 754 F.2d at 329)(emphasis added). More recently, the Tenth Circuit has clarified specifically how a treating physician's opinion is to be weighed. Watkins v. Barnhart, 350 F.3d 1297, 1300-01 (10th Cir. 2003).

Moreover, as the Commissioner argues, the record contains no opinion of Dr. Stevens to which the ALJ might have accorded

substantial weight and which was not accord that weight. "Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of [a claimant's] impairment(s) including [claimant's] symptoms, diagnosis and prognosis." 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2).

The ALJ noted that Dr. Stevens treated plaintiff for breathing problems and pitting edema. (R. 24). He found that plaintiff has severe impairments including edema and asthma. (R. 26). To this extent, the ALJ gave substantial weight if not controlling weight to Dr. Stevens's opinion regarding the nature of plaintiff's impairments and symptoms and to Dr. Stevens's diagnoses. Beyond this basic information, plaintiff points to no opinion provided by Dr. Stevens regarding the specific severity of plaintiff's condition(s) or the limitations and restrictions resulting from that condition(s).

However, plaintiff is correct that the ALJ erred in weighing the opinion of Dr. Pulcher. The ALJ correctly noted that Dr. Pulcher examined plaintiff, that plaintiff reported to Dr. Pulcher that she sees dead family members, that Dr. Pulcher assessed plaintiff with a Global Assessment of Function (GAF) of 45, and that Dr. Pulcher diagnosed plaintiff with severe major depressive disorder with congruent psychotic features. (R. 25). The ALJ later stated that he assigned great weight to the opinion

"of claimant's treating psychiatrist, Dr. Pulcher . . . because it indicates that her mental impairment was worse." Id. As plaintiff points out, the decision reveals the ALJ made two factual errors in his finding (1) because Dr. Pulcher is a psychologist, not a psychiatrist; and (2) because Dr. Pulcher is a nontreating physician, not a treating physician. (Pl. Br. 10).

As plaintiff claims, Dr. Pulcher is a psychologist who examined plaintiff one time at the request of the state agency and provided a consultative evaluation regarding plaintiff's mental condition. (R. 227-31). Therefore, he is a nontreating source, his opinion may never be given controlling weight, and his opinion is not worthy of the deference afforded a treating source opinion. Doyal v. Barnhart, 331 F.3d 758, 762 (10th Cir. 2003); Robinson v. Barnhart, 366 F.3d 1078, 1084 (10th Cir. 2004). However, when the ALJ stated that he gave great weight to Dr. Pulcher's opinion as a treating source, he implied that he had weighed the opinion and accorded it deference as a treating source opinion. This is error requiring remand.

The Commissioner does not argue that the ALJ recognized Dr. Pulcher as a nontreating source and that his statement the doctor was a "treating psychiatrist" was a harmless typographic error. But, even if the court were to consider that possibility it must reverse, because at best the court cannot discern what legal

standard the ALJ applied to evaluating and assigning weight to Dr. Pulcher's opinion.

Because the record contains no treating source opinion regarding plaintiff's functional limitations formulated in the period before Dr. Block began treating plaintiff in Jan. 2004, it will be necessary for the Commissioner on remand to weigh all of the medical opinions relevant to that period by applying the regulatory factors. 20 C.F.R. §§ 404.1527(d), 416.927(d)("Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion."). It will then be necessary to explain the weight given those opinions, and apply the sequential evaluation process in assessing plaintiff's disability.

V. Remaining Argument

In one other argument, plaintiff claims the ALJ erred in failing to apply SSR 83-20 to determine the onset date of plaintiff's disability. (Pl. Br. 8-9). Application of the medical evidence and the medical opinions is central to a determination of onset date. SSR 83-20, West's Soc. Sec. Reporting Serv., Rulings 51 (1992)(onset date "can never be inconsistent with the medical evidence of record"). The court has determined that remand is necessary to properly weigh the medical opinions of record. Therefore, it would be premature to

attempt to determine whether the ALJ here properly determined the onset date of plaintiff's disability. Plaintiff may make her arguments regarding onset date on remand.

IT IS THEREFORE RECOMMENDED that the Commissioner's decision be REVERSED and that judgment be entered in accordance with the fourth sentence of 42 U.S.C. § 405(g) REMANDING the case for further proceedings consistent with this opinion.

Copies of this recommendation and report shall be delivered to counsel of record for the parties. Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and D. Kan. Rule 72.1.4, the parties may serve and file written objections to this recommendation within ten days after being served with a copy. Failure to timely file objections with the court will be deemed a waiver of appellate review. Morales-Fernandez v. INS, 418 F.3d 1116, 1119 (10th Cir. 2005).

Dated this 17th day of April 2009, at Wichita, Kansas.

s/Donald W. Bostwick
DONALD W. BOSTWICK
United States Magistrate Judge